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In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF OF SAVE THE BAY – PEOPLE FOR NARRAGANSETT BAY, *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Takings Clause was originally understood to apply to laws regulating uses of private property that disrupt the propagation of fish.

2. Whether the State's power to regulate private property to protect the propagation of fish is a background principle of Rhode Island property law.

3. Whether the Takings Clause was originally understood to apply to any regulation of private property that preserves economically viable use.

4. Whether a littoral owner has the right under Rhode Island property law to fill-out submerged or tide-flowed lands.

5. Whether the State's power to regulate private property to protect groundwater from degradation is a background principle of Rhode Island property law.

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INTEREST OF AMICUS CURIAE

Amicus curiae Save the Bay – People for Narragansett Bay is a not-for-profit organization with its headquarters in Providence, Rhode Island whose purpose is the protection and restoration of Narragansett Bay and adjacent coastal waters.[1] Save the Bay – People for Narragansett Bay has an interest in this case because it presents a fundamental challenge to the authority of the State of Rhode Island and other government agencies to effectively implement legislation protecting the Narragansett Bay and its waters and shores.

STATEMENT OF THE CASE

Save the Bay – People for Narragansett Bay adopts the Statement of the Case presented by respondents Rhode Island and the Coastal Resources Management Council, together with petitioner's statement that "he readily concedes for purposes of review in this Court that he became 'owner' of the property in 1978." Reply to Opposition to Petition for Writ of Certiorari, at 2.

SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to synthesize several strands of the regulatory takings doctrine into a more unified whole. Three lines of reasoning converge to support affirming the decision of the Rhode Island Supreme Court. Concrete evidence of the original understanding of the Takings Clause, pertinent foundational reasoning from the Court's regulatory takings opinions in the early twentieth century, and the Court's

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[1] Counsel for the parties have consented to the filing of this *amicus* brief, and letters of consent have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part. *See* Supreme Court Rule 37.

more recent focus on background principles of property support the same result here.

This brief presents concrete historical evidence of the original understanding of the Takings Clause with regard to regulation, not previously considered by the Court. Statutes imposing regulation of land use were common in America in the early republic. Regulation of land (even for objectives unrelated to health, safety or morality) was a familiar part of the legal landscape. James Madison, who drafted the Takings Clause, was quite familiar with land use regulation based on his experience in the Virginia Assembly and in Congress. This statutory evidence conclusively disproves the modern reason for expanding the Takings Clause beyond appropriation to regulation generally: an assumption that land use regulation only came later and was thus unknown to the framers of the Constitution and Bill of Rights.

More particularly, early state laws restricting the use of private riparian property in order to protect propagation of fish offer examples of early regulation, known to James Madison, that are factually analogous to the fish protection measures of Rhode Island's protection of wetlands, implemented in this case. Then as now, fish were important as food. Affirming the decision below based on evidence of original understanding would bring takings doctrine into harmony with the ordinary meaning of the Constitutional text.

As for the early twentieth century foundations of the Court's modern regulatory takings jurisprudence, Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), if read in its original context, offers clear guidance for resolving the present case. *Pennsylvania Coal*, rather than calling for a new doctrine of regulatory takings, was instead an application of existing doctrine to a new set of facts. As Justice Holmes said in *Pennsylvania Coal* and elsewhere, factual analogies to precedent rather than abstract formulas were critical to the gradual clarification of takings doctrine.

For purposes of resolving the present case, the most analogous decision to turn to among the *Pennsylvania Coal* line of precedents is *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), another case in which Justice Holmes wrote for the Court. There, in overruling a takings claim raised against a state statute imposing water conservation restrictions on riparian proprietors, Justice Holmes concluded from precedent and principle alike that water conservation and conservation of game were two areas in which the police power definitely prevailed over the rights of property owners, without requiring a State to prove that the conservation measures were essential to satisfy current or projected needs. Conservation measures, for Justice Holmes, were among the doctrinal "boundary stones" already in place. *Id.* at 355. That reasoning is pertinent here because water conservation and conservation of fish and game are among the principal policy objectives behind Rhode Island's decision preserving wetlands in this case.

Also pertinent to the present case is Justice Holmes's explanation of how regulatory takings doctrine would apply to restrictions on an urban building lot. To "limit the height of buildings, in a city," would not require compensation unless the height were limited to such an extent that "an ordinary building lot" would be "wholly useless." *Hudson County Water Co., supra*, 209 U.S. at 355. That reasoning provides a close basis for analogy here, supporting the decision below, because the petitioner's takings claim is based on being allowed to construct buildings only on part of his lot rather than throughout his entire lot. In the wetlands context, building restrictions limit horizontal extension rather than vertical extension, but the same doctrinal boundary line of whether or not the restrictions preserve a valuable use of the building lot should apply.

A third, more recent theme in the Court's takings jurisprudence has been to compare the challenged regulations to "the restrictions that background principles of

the State's law of property and nuisance already in place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). In this case longstanding principles of Rhode Island property law, reflected in court decisions and in statutes, support affirming the decision below.

Rhode Island property law makes clear that the State owns all land that is submerged or flowed by the tide, in trust for the public benefit, that filling out from contiguous dry upland may occur only with the permission of the State, and that an owner of upland does not gain title to the submerged or tidal lands until such permission has been received and detrimentally relied on. These principles of property law derive from the royal charter of 1663 and a long line of decisions of the Rhode Island Supreme Court going back over a century. They are illustrated by various statutory provisions, some over a century old and some tested in court long ago. The public benefit that the State must guard, as the Rhode Island Constitution has made clear since 1843, includes a public right of "fishery." A related principle of Rhode Island property law is that the State may restrict the use of private property, in order to protect the propagation of fish. *See Payne & Butler v. Providence Gas Co.*, 31 R.I. 295, 77 Atl. 145, 158 (1910) ("the whole subject of fisheries, floating and shellfish . . . wherever situate within the public domain of the state of Rhode Island, are under the fostering care of the General Assembly"). Protecting fish populations was one of the reasons the State denied petitioner's application to dredge and fill.

A separate principle of Rhode Island property law is that the State may restrict private property use in order to conserve the quality of water. For most of the last century the State has cautiously supervised sources of drinking water. "Environmentalism" may be of recent vintage, but "conservation" has a long history in Rhode Island. Guarding against pollution of groundwater, the ultimate

source of local drinking water, was one of the reasons the State denied petitioner's application to dredge and fill.

ARGUMENT

I. Rhode Island Laws Regulating Private Property to Protect Propagation of Fish Do Not Violate the Takings Clause

The coastal wetland that petitioner wants to fill "serves as a refuge and feeding ground for fish [and] shellfish." Opinion of Rhode Island Supreme Court (Feb. 25, 2000), Petitioner's Appendix at A-3. Permitting petitioner to fill this wetland "would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island." Decision of Rhode Island Superior Court (Oct. 24, 1977), Pet. App. at B-10. Protection of fish was a principal reason for the Decision of the Rhode Island Coastal Resources Management Council (Mar. 3, 1986), denying petitioner's application to fill contiguous wetland. Joint App. at 27.

A. Laws Regulating Private Property to Protect Propagation of Fish Were Not Within the Original Understanding of the Takings Clause

Laws regulating uses of private property to protect propagation of fish from incidental disruption are far older than has been generally recognized. In 1791, when the Fifth Amendment was ratified, many states had laws in effect (some dating from the colonial era) protecting propagation of fish from incidental disruption by water-powered mill dams that obstructed fish swimming upstream to breed. *See* R.I. Col. Act of 1735; R.I. Revised Pub. Laws, p. 490 (1798); Mass. Col. Act of 1743 [App. to 2 Mass. Laws of 1792-1800 (1816)]; Mass. Act of Feb. 22, 1792; N.H. Act of June 18, 1790, ch. 18; N.H. Act of Jan. 12, 1795, ch. 19; Conn. Act of Oct. 1785; Conn. Act of Oct.

1793; Pa. Col. Act of Mar. 9, 1771, ch. 823; Pa. Act of Mar. 5, 1790, ch. 1490; Va. Act of Oct. 1785, ch. LXXXII; N.C. Act of Nov. 1787, ch. 272; N.C. Code of 1821, pp. 568-69; S.C. Act of Mar. 26, 1784, No. 1226; S.C. Act of Dec. 21, 1792, No. 1557.

These laws prohibited, or authorized local authorities to prohibit, building or maintaining dams that obstructed the upstream passage of fish. A dam owner permitted merely to make an opening in the dam sufficient for fish to pass through would be economically burdened for the relevant period of time each year, because the substantial loss of water power entailed by such an opening would greatly reduce the mill's power. *See, e.g.*, Conn. Act of Oct. 1793, 1 Public Statute Laws of Conn. 332 (1808) (dam owners required to "open a sluice-way in such dam twelve feet in width, and within six inches of the bottom of the river").

The fish-passage laws reflected a legislative judgment that the normal operation of an otherwise legitimate mill dam was interfering with the public's right to enjoy this natural supply of food undiminished. *Cf. Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (Holmes, J.) (citing *Geer v. Connecticut*, 161 U.S. 519, 534 (1896)) (a State has right as inheritor of royal prerogative to "make laws for the preservation of game"); this right "flows from the duty of the State to preserve for its people a valuable food supply." *Geer, loc. cit.*, 161 U.S. at 534. Fish have since the earliest settlements served as a valuable food supply for Americans. This was also true for the English, who had their own laws restricting private property in order to protect dwindling fish populations. *See, e.g.*, 4 Anne c. 21, sec. 4 (1705) (requiring owners of diked or banked "meadows," where salmon go, to permit salmon to return to rivers through "cuts");

id., sec. 5 (requiring owners of mill dams to make openings for salmon to pass upstream and downstream).

Regulation protecting the propagation of fish from incidental disruption caused by private land use, then, is well represented in "the laws and practices of our ancestors." *See Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 178 (1872)). Such regulation was conventional when Americans formed the first "State constitutions, or other forms of social compact," *Munn v. Illinois*, 94 U.S. 113, 124 (1877). The existence of the state fish-passage laws suggests strongly that the state conventions that ratified the Fifth Amendment did not understand it to be threatening the states' conventional power to protect propagation of fish in this way. Laws of this character should therefore be recognized as part of the "historical compact recorded in the Takings Clause," like nuisance law, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992); part of a regulatory power that "the Takings Clause did not transform." *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 (1987).

The Virginia fish-passage law is particularly significant because of its association with James Madison, author of the initial draft of the Bill of Rights. Madison introduced the Takings Clause of his own volition, rather than in response to the recommendation of a state ratifying convention. *See* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 708-09 (1985). In 1785 Madison himself had introduced Virginia's fish-passage legislation in the Virginia General Assembly. *See* 8 The Papers of James Madison 395 (bill "concerning milldams and other obstructions of water courses") (Robert A. Rutland et al. Ed., 1973); Va. Act of Oct. 1785, ch. LXXXII. This law authorized county courts to protect the upstream passage

of fish from being obstructed by mill dams in "any water course" in the state, navigable or not. *Id.*

The chronological proximity of Virginia's fish-passage law (1785) and the Takings Clause (1789) strongly suggests that when Madison drafted the Takings Clause, he did not intend that it "transform" the States' conventional power to protect propagation of fish from incidental disruption caused by the use of private land. *See Keystone, supra,* 480 U.S. at 492. (Indeed, the Virginia fish-passage law introduced by Madison was contemporaneous with Madison's suggestion of language similar to the Takings Clause for use in a new state's constitution. *See* Letter of Aug. 23, 1785, 8 Papers of James Madison, *supra,* at 351.)

The Virginia fish-passage law is additionally significant because it served as municipal law in the portion of the District of Columbia ceded by Virginia to the federal government. *See* Act of Feb. 27, 1801, 2 U.S. Statutes at Large 103, 104. The Court has viewed laws (not judicially overturned) governing the District of Columbia before the Fourteenth Amendment as good evidence of the original meaning of the Fifth Amendment, because the Bill of Rights directly applied to the District of Columbia from the outset. *See Munn v. Illinois,* 94 U.S. 113, 125 (1877). The Virginia fish-passage law was a comparatively extreme measure, in that permission given to operate a dam under its provisions was only provisional, and had to be applied for again whenever the dam needed repair (a common occurrence). The Virginia fish-passage law was subject to the Fifth Amendment in the District of Columbia beginning in 1801, only ten years after ratification of the Bill of Rights.

The fact that this fish-passage law was not contested in court by mill dam owners even in the District of Columbia suggests that contemporaries believed "the

Takings Clause did not transform" the states' conventional power to protect the propagation of fish by regulating the use of private property. *See Keystone, supra,* 480 U.S. at 492. All of the early fish-passage laws, especially Virginia's, are good evidence of relevant "practices and beliefs held by the Founders" on the subject of regulating land use for purposes of wildlife conservation. *See MacIntyre v. Ohio Elections Commission,* 514 U.S. 334, 360 (1995) (Thomas, J., concurring).

B. The State's Power to Regulate Private Property to Protect Propagation of Fish Is a Background Principle of Rhode Island Property Law

Rhode Island has power to regulate property in order to protect fish by virtue of its 1663 royal charter, and by virtue of its status as successor to the powers of both the Crown and Parliament in 1776. *See Payne & Butler v. Providence Gas Co.,* 31 R.I. 295, 77 Atl. 145, 153 (1910). Rhode Island law before and after ratification of the Takings Clause in 1791 exemplify the exercise of this power. All of the following examples far predate petitioner's 1978 acquisition of the wetland at issue here. *See* Reply to Opposition to Petition for Writ of Certiorari, at 2.

In *Lucas* the Court seemed to suggest that among modern American sources of land use regulation, only the common law of nuisance is as old as the Takings Clause, 505 U.S. at 1028.

This historical premise is incorrect. *See* Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law,* 15 Stanford Environmental L.J. 247, 282-303 (1996); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause,* 94 Northwestern U. L. Rev. 1099, 1107-37 (2000); John F. Hart, *Colonial Land Use Law and Its Significance For Modern Takings Doctrine,* 109 Harvard L. Rev. 1252, 1259-81 (1996).

A regulatory takings opinion by Justice Holmes, having to do with water conservation, illustrates an appropriately more inclusive recognition of the historical sources of regulatory law. Justice Holmes derived the analogous right of States to "make laws for the preservation of game, which seems a stronger case" from each State's status as "the inheritor of a royal prerogative" as well as from the "principle of public interest and the police power." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (citing *Geer v. Connecticut*, 161 U.S. 519, 534 (1896)). This opinion, taken together with *Lucas*, stands for the principle that regulatory powers found in English law prior to 1776 or American law prior to 1791 should be viewed as not violating the Takings Clause. *See also Lucas*, 505 U.S. at 1035 (Kennedy, J.) (landowner's "reasonable expectations must be understood in light of the whole of our legal tradition").

The power of Rhode Island's Assembly to regulate private land use in order to protect fish propagation from incidental disruption was manifested as early as 1735, when it prohibited the owners of mill dams from obstructing the upstream passage of fish during a defined season, thus imposing a duty of making "good and sufficient" openings in dams. R.I. Col. Act of 1735, R.I. Revised Pub. Laws, p. 490 (1798). This law's burden on investment-backed expectations was quite substantial, in that it included existing as well as future dams. *Id.* The scope of the Act was broad: it applied to "*any* fresh river, brook, or course of water, where *any* fish usually pass," and it protected both upstream and downstream passage ("pass and repass"). *Id.* (emphasis added).

These laws show that Rhode Island regulated private property in order to protect propagation of fish when Independence was declared, and when the Bill of Rights was ratified. Because Rhode Island's power to restrict the

use of private property in order to protect fish was well established in "the understandings of our citizens" when the Takings Clause was ratified in 1791, this power deserves to be accommodated in the "constitutional culture" of the Takings Clause, just as the common law doctrine of nuisance has been accommodated. *See Lucas*, 505 U.S. at 1027-28. This is especially appropriate given the Court's recognition that "the source of the police power as to game birds . . . flows from the duty of the State to preserve for its people a valuable food supply." *Geer, supra*, 161 U.S. at 534 (cited in *Hudson County Water Co., supra*, 209 U.S. at 356 (Holmes, J.)). For the people of Rhode Island, fish have served as a valuable food supply since the earliest settlements.

Rhode Island's regulatory protection of fish has subserved the public right of "fishery," which has also been traced back to the colonial era in Rhode Island law, and derives ultimately from the Charter of 1663. *See Payne & Butler, supra*, 77 Atl. at 153. The Rhode Island Constitution (which replaced the colonial charter as the state's fundamental law in 1843) has always confirmed in its Takings Clause that "[t]he people shall continue to enjoy and freely exercise all the rights of fishery." Art. I, sec. 17. *See Payne & Butler, supra*, 77 Atl. at 153. *See also State v. Kofines*, 33 R.I. 211, 80 Atl. 432, 438 (1911) ("it is necessary to consider how the people of the state may receive the greatest benefit from the conservation of their interests in this regard"); *State v. Cozzens*, 2 R.I. 561, 564 (1850) ("legislative restriction is indispensable to secure to the public the benefit of the oyster fishery").

During all this time, the State has held "title" to "land flowed by tide water;" to "land below high-water mark." And the State's promotion of the public right of fishery has extended throughout such lands.

> [T]he whole subject of fisheries, floating and shellfish . . . wherever situate within the public

> domain of the state of Rhode Island, are under the fostering care of the General Assembly. It is for the Legislature to make such laws regulating and governing the subject of . . . pisciculture, as they may deem expedient.

See Payne & Butler, supra, 77 Atl. at 158.

Rhode Island's early statutes demonstrate that salt "ponds" are among the public waters regulated by the State to protect fish (fin-fish and shell-fish). *See* R.I. Revised Pub. Laws (1798), pp. 496-97; R.I. Public Laws (1844), pp. 532, 534-35, 537, 538. Public rights in salt ponds such as Westerly's are also manifested in early twentieth century statutes. *See* R.I. Gen. Laws (1909), ch. 202, sec. 13 (directing commissioners not to lease any ponds in certain towns for use as private oyster fisheries); R.I. Gen. Laws (1923), ch. 230, sec. 8 (state commissioners authorized to lease "any piece of land . . . , below mean low-water mark" in "Brightman's or Babcock's pond" in Westerly); R.I. Gen. Laws (1938), ch. 634, sec. 1 ("waters" include "*all tide waters* within the state" and "all inland waters of any . . . *pond*") (emphasis added); R.I. Pub. Laws (1942), ch. 1148 (state agency directed to "open and keep open" breachways from salt ponds to the ocean "whenever necessary or desirable to *conserve the marine life in any salt pond*") (emphasis added). Another pertinent illustration of Rhode Island's police power from long before petitioner's 1978 acquisition is found in the zoning act directing the town of Westerly to "promote . . . the *conservation* of . . . *waters*, stream courses and other natural resources." R.I. Pub. Laws (1925), ch. 746, sec. 1 at pp. 350-51 (emphasis added). The separate reference to "waters" and "stream courses," in an act for a coastal town, indicates that Westerly's ponds and marshes were among the town's "waters" eligible for conservation.

Another pertinent statute, illustrating the State's broad power to protect propagation of fish as a food

source, prohibited polluting with sewage any "waters," where "waters" included "all tide waters within the state" and "all inland waters of any . . . pond." R.I. Gen. Laws (1923), ch. 123, sec. 1. The statute defined "sewage" so broadly as to include "every *substance* . . . which would injuriously affect the *natural and healthy propagation, growth, or development of any fish or shell-fish in the waters of this state, or of the nourishment of the same,* or which would injuriously affect the *flavor, taste or value as food of any such fish or shell-fish.*" *Id.* (emphasis added). *Cf.*, R.I. Gen. Laws (1938), ch. 112, sec. 7 (division of harbors and rivers directed to "regulate the depositing of *mud, dirt, and other substances* in the public *tide-waters* of the state") (emphasis added).

The constitutionality of this water pollution statute, including the provision regarding impact on fish, was upheld in *Board of Purification of Waters v. Town of East Providence*, 47 R.I. 431, 434, 133 Atl. 812 (1926). Given the Superior Court's finding that petitioner's planned filling of wetlands "would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island," Pet. App. at B-10 (not disputed on appeal), the Assembly's 1923 definition of "sewage" would today comprehend petitioner's plans.

II. No Regulation That Preserves An Economically Beneficial Use of Land Violates the Takings Clause

Both lower courts found that Rhode Island's restrictions on filling coastal wetlands did not deprive petitioner of all economically beneficial use of his land, because the dry upland portion of the parcel had valuable uses remaining. *See* Opinion of Rhode Island Supreme Court (Feb. 25, 2000), Pet. App. at A-12, 13; Decision of Rhode Island Superior Ct. (Oct. 24, 1977), Pet. App. at B-9, 10.

These findings are not disputed by petitioner. These findings should be recognized as dispositive here, if the Court adheres to either the original understanding of the Takings Clause or the understanding of the regulatory takings doctrine manifested in Justice Holmes's opinions in the era when the Takings Clause was incorporated into the Fourteenth Amendment.

A. Regulation That Preserves An Economically Beneficial Use of Land Falls Outside The Original Understanding of the Takings Clause

Historical research has made it increasingly clear that the Takings Clause was originally understood to apply only to governmental appropriation of private property, not to regulation of private property. *See* Fred Bosselman et al., The Taking Issue 104 (1973); Note, *Origins and Original Significance of the Just Compensation Clause, supra,* 94 Yale L.J. at 710-12; Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, supra,* 94 Northwestern U. L. Rev. at 1131-47. Legislative history from the drafting or the ratification of the Takings Clause contains no suggestion that it was intended to apply metaphorically to regulation, as well as literally to appropriation. *See* Bosselman, The Taking Issue, *supra,* at 99-100; Note, *Origins and Original Significance of the Just Compensation Clause, supra,* 94 Yale L.J. at 791. *Cf. Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 199 (1985) (distinguishes "literally" from "figuratively" taking property).

A fundamental historical point, not previously considered in this Court's regulatory takings opinions, is that regulation of private land (even for objectives unrelated to health, safety or morality) was a common governmental practice in 1791. Broad powers of land use regulation were well known to the framers of the Takings

Clause. This is shown directly by several early Acts of Congress. When Congress admitted Kentucky into the Union, it explicitly endorsed the "conditions" for such admission imposed by a Virginia statute. *See* Act of Feb. 4, 1791, ch. IV, 1 Stat. 189 (1791). One of these conditions was that the right of Virginia and Kentucky to impose forfeiture on unimproved land belonging to each other's nonresident citizens would be suspended for six years. *See* Va. Act of Oct. 1789, ch. XIV, sec. 8.

Congress also required owners of land "at Vincennes or in the Illinois country" who had lived there in 1783 or before to return to their land and occupy it in person, or else forfeit their land. *See* Act of Mar. 3, 1791, ch. XXVII, sec. 2, 1 Stat. 221. Many of the lands in question were held under French title and had already been improved in accordance with the original grant conditions. Congress barred alienation of land claims previously promised to Canadian refugees, thus making such claims less useful and less valuable. *See* Act of Apr. 7, 1798, ch. XXVI, sec. 2, 1 Stat. 547. *See generally* Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, supra,* 94 Nw. U. L. Rev. at 1139-43. These Acts of Congress were apparently not regarded by James Madison or his contemporaries as implicating the Takings Clause.

In the states, also, regulation of private land for objectives unrelated to health, safety or morality was a common governmental practice in 1791. Contemporary examples of regulating land (after its acquisition) included aesthetic regulation of town buildings, obligatory participation in agricultural projects, restraints on acquisition and alienation, and improvement requirements. *See id.,* 94 Nw. U. L. Rev. at 1107-16, 1117-19, 1122-24, 1127-28. Some of these restrictions imposed or threatened very substantial costs on the landowner. *See id.* at 1134. Federal territories, which were all subject to

just compensation requirements of some form, also enacted laws compelling unwilling landowners to participate in agricultural projects. Extensive regulation of private land use had also occurred in the colonial era. *See* Hart, *Colonial Land Use Law*, *supra*, 109 Harvard L. Rev. at 1259-81.

As of 1791, when the Takings Clause was ratified, no American legislature or court had ever directed that compensation be paid for any of these regulatory restrictions on the use of private land. If someone as articulate as Madison had wanted to alter this status quo, he would have done so unmistakably in the Takings Clause. *See U.S. Term Limits v. Thornton*, 115 S.Ct. 1842, 1875 (1995) ("where the Constitution is silent, it raises no bar to action by the States or the people") (Thomas, J., dissenting).

When land was appropriated, in contrast, the principle of compensation was generally observed in 1791. *See generally* James W. Ely, Jr., *"That due satisfaction may be made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 American Journal of Legal History 1 (1992); Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, *supra*, 94 Nw. U. L. Rev. at 1134. This was true even for small parcels of land. *See* Ely, *supra*, at 5-6.

A single, isolated exception to observation of the compensation principle by American legislatures was found only in a minority of states. In these states, unimproved (i.e., unenclosed or uncleared) land could still generally be used for highways without compensation. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Washington L. Rev. 553, 581-82 (1972); Ely, *supra*, 36 Am. J. Legal Hist. at 7-10. Even this isolated exception to the general practice, however, should be understood with reference to two observations.

First, regarding unimproved land in a sparsely developed countryside, "a new road would give more value than it took." Stoebuck, *supra*, 47 Wash. L. Rev. at 582-83. Second, as of 1791 the practice of taking unimproved land without payment was already disappearing. *See, e.g.*, Va. Act of Oct. 1785, ch. LXXV (requiring payment of compensation whenever any land was taken for a highway). By 1791 the only states not yet requiring compensation whenever unimproved land was taken for highways were Georgia, South Carolina, Maryland, Delaware, Pennsylvania and New Jersey. *See* Stoebuck, *supra*, 47 Wash. L. Rev. at 581-82; John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 American Journal of Legal History 253, 258-63 (1996).

Of these states, moreover, Pennsylvania and Delaware already effectively observed the compensation principle even for unimproved lands used for highways, because land patents there had included an extra six acres per hundred, for the specific purpose of future highways. *See* Stoebuck, *supra*, 47 Wash. L. Rev. at 581; Hart, *The Colonial Highway Acts*, 40 Am. J. Legal Hist. at 261-62. Maryland paid compensation for all highway land in some counties by 1800, *see* Md. Act of Dec. 19, 1800, ch. 17, and throughout the state by 1818. Md. Act of Dec. 1818, ch. 89. Georgia and South Carolina, which both had a thinly populated back-country, seem consistent with the offsetting-benefits principle described by Professor Stoebuck. *See* Stoebuck, *supra*, 47 Wash. L. Rev. at 582-83.

Therefore the conclusion that "[t]he practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses [in 1897] – which . . . occasionally included *outright physical appropriation* of land without compensation – were out of accord with *any* plausible interpretation of those provisions," *Lucas*, *supra*, 505 U.S.

at 1028 n.15 (emphasis in original), is greatly overgeneralized. The practices of most states in 1791 were entirely consistent with a plausible interpretation of those provisions: that appropriation or physical invasion of property was included, while regulation was not. Rhode Island, for example, had since 1715 required compensation when any kind of land was used for a highway, R.I. Col. Stat. 1715, besides requiring compensation for land generally. Six states adhered to the same principle of compensation except for using unimproved land for highways; even in some of these states this exception was reconcilable with the compensation principle. The historical culture of the Takings Clause does not dictate that the early sins of Georgia or New Jersey with respect to highways should today hinder Rhode Island's efforts today to preserve its fisheries.

This evidence that the original understanding of the Takings Clause included appropriation but not regulation is reinforced by considering the ordinary meaning of the Takings Clause. The ordinary meaning of "taken" is "appropriated." Even scholars sympathetic to the regulatory takings doctrine have conceded that the ordinary and original meaning of the Takings Clause embraced appropriation but not regulation. *See* Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 39-40 (1964) (arguing that original distinction between "appropriation" and "regulation" became obsolete after late nineteenth century); Lynda L. Butler, *The Politics of Takings: Choosing the Appropriate Decisionmaker*, 38 William & Mary L. Rev. 749, 753-55 (1997) (similar); *cf.* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) ("Categorical reliance upon historical intention must also confront the problem of novel institutions in changed circumstances"). In light of the extensive history of early land use regulation disclosed by recent

research, *supra*, interpreting "taken" to mean "regulated" would today no longer be a plausible reading of the constitutional text, but an anachronism. *Cf. Lucas*, 505 U.S. at 1028 n.15.

In *Lucas*, the Court stated the rule that a land regulation causing "loss of all economically beneficial use" would be deemed a taking unless justified by reference to "background principles of nuisance and property law." 505 U.S. at 1027, 1031. To extend the original and ordinary meaning of the Takings Clause that far only, premised on economic equivalence between appropriation and the loss of all use-value, preserves the textual integrity of the Takings Clause.

But to go further and extend the Takings Clause to other so-called regulatory takings, based on the later premise that all potential value is property, creates a penumbra of very dubious legitimacy. *See MacIntyre v. Ohio Elections Commission*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (criticizing "analysis that is largely unconnected to the Constitution's text and history"); *Austin v. United States*, 509 U.S. 602, 628 (1993) (Kennedy, J., concurring) ("we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved"). Taking into account the ordinary meaning of the Takings Clause together with the original understanding allows for the Court's rule of total takings in *Lucas, supra*, without resorting to "a classic exercise of judicial balancing of competing values." *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994).

B. Takings Doctrine Contemporaneous With Incorporating the Takings Clause Into the Fourteenth Amendment Did Not Treat as Takings Regulations That Preserved Economically Beneficial Use of Property

State law is said to have come within the ambit of the Takings Clause, by virtue of the incorporation doctrine, in *Chicago, Burlington & Quincy Railway v. Chicago*, 166 U.S. 226 (1897). The "practices of the States" prior to that incorporation have been called "entirely irrelevant." *See Lucas*, 505 U.S. at 1028 n.15. If the Court refers instead to the doctrine of regulatory takings of the era that followed incorporation, including Justice Holmes's takings opinions, that analysis will support affirming the decisions of the Rhode Island courts.

A law which "restricts the exercise of rights of property to uses and modes of disposition less profitable than those previously allowed, does not amount to a taking of property, if other profitable methods of disposition remain lawful." Ernst Freund, The Police Power: Public Policy and Constitutional Rights 550 (1904). Justice Holmes made the same point in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

> [T]he police power may limit the height of buildings, in a city, without compensation. . . . To that extent it cuts down what would otherwise be the rights of property. But if it should attempt to limit the height *so far as to make an ordinary building lot wholly useless*, . . . the police power would fail. To set such a limit would need compensation.

Id. at 355 (emphasis added). Justice Holmes's building-lot hypothetical is analogous to the regulation applicable to petitioner, recognizing that the problem of building out onto wetlands contiguous to dry upland is one of horizontal extension rather than vertical extension.

The *Hudson County Water Co.* principle of upholding land regulation that preserves some value is illustrated best by *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915). There the Court (including Justice Holmes) upheld a zoning ordinance prohibiting brick manufacture against a claim that it deprived the owner of property without due process, even though the land's value allegedly declined from $800,000 to $60,000 (92.5%). *Id.* It was sufficient that some valuable use remained. *See also Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% decrease in value). Thus in *Williamson County Regional Planning Commission, supra*, 473 U.S. at 199, the Court glossed *Pennsylvania Coal* as calling for a court to "distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *See Milardo v. Coastal Resources Management Council*, 434 Atl.2d 266, 270 (R.I. 1981) (citing *Pennsylvania Coal* for the proposition that compensation is owed "if regulation pursuant to the police power deprives a landowner of all beneficial use of his property").

Justice Holmes's *Hudson County Water Co.* opinion is also relevant to petitioner's regulatory takings claim in other ways. There as here, the interest behind the State regulation was conservation of a natural resource. There the natural resource the State sought to conserve was water; here the State seeks to conserve water as well as the fish and game dependent on the water's natural condition. In *Hudson County Water Co.*, Justice Holmes acknowledged the difficulty of defining the valid reach of the police power in the absence of concretely analogous precedents, but singled out conservation of natural resources as a category where history and principle both supported some relatively clear "boundary stones." 209 U.S. at 355-56.

> [I]t is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . . This public interest [in water conservation] is omnipresent wherever there is a State . . . . It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. . . . the private right to appropriate is subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

Id. at 355-56. Justice Holmes also concluded from the same background of history and principle that "the State may make laws for the preservation of game, which seems a stronger case." *Id.* at 356 (citing *Geer v. Connecticut*, 161 U.S. 519, 534 (1896)).

Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is very much continuous with that in *Hudson County Water Co., supra.* In discussing generally the problem of drawing a boundary between "property" and "police power," the two opinions are highly similar. *See Hudson County Water Co.*, 209 U.S. at 355-56 ("All rights tend to declare themselves absolute," but "all are limited by the neighborhood of principles of policy;" the "boundary at which the conflicting interests balance cannot be determined by any general formula in advance"); *Pennsylvania Coal*, 260 U.S. at 415 (rights of property are "seemingly absolute," but are "qualified by the police power"); *id.* at 416 ("this is a question of degree – and therefore cannot be disposed of by general propositions").

The *Pennsylvania Coal* opinion, if read in isolation, may seem to announce the beginning of a new doctrine, a

very modern-sounding proposal that courts should simply use their own sense of reasonableness to judge for themselves when the government goes "too far." 260 U.S. at 415. But that is a mistaken reading. The Court did not inaugurate a new doctrine of regulatory takings in *Pennsylvania Coal;* it persevered in its prior project of clarifying the boundary between police power and property rights based on analogies to precedent, informed by "principle" and "tradition," *see* 260 U.S. at 416. *See id.* ("the cases decided by this Court"); Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 Yale L.J. 613, 666 (1996) (Justice Holmes and the 1922 Court viewed *Pennsylvania Coal* not as "a seminal case," but as "one among many that incrementally established the limits of the police power"). For Holmes, a number of doctrinal "boundary stones" were already in place at the time of *Pennsylvania Coal. See Hudson County Water Co.*, 209 U.S. at 355. When Justice Holmes wrote in *Pennsylvania Coal* that the circumstances of the coal case went beyond "the cases decided by this Court," 260 U.S. at 416, the cases he had in mind surely would have included *Hadacheck, supra* (in which he had joined the majority) and *Hudson County Water Co., supra.* His statement implies that the decrease in property value threatened in *Pennsylvania Coal* exceeded the 92.5% decrease the Court had upheld only seven years before in *Hadacheck, supra,* 239 U.S. at 405. *See Pennsylvania Coal,* 260 U.S. at 414 ("To make it commercially impossible to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it").

As a basis for analogy, however, *Pennsylvania Coal* is much less germane to petitioner's claim than *Hudson County Water Co.* is. In *Pennsylvania Coal,* the Contract

Clause claim was central to the holding, as shown in the final sentences:

> The question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

260 U.S. at 416. In *Hudson County Water Co.*, the Contract Clause claim was peripheral to the holding; it elicited "but a few words more." 209 U.S. at 357. Petitioner's claim against Rhode Island's coastal management authorities raises no Contract Clause claims.

Another important distinction is that in *Pennsylvania Coal* the Court viewed the asserted public interest as dubious ("limited"), because the statute did not ordinarily apply when the surface was "owned by the owner of the coal," and because the purported safety objectives "could be provided for by notice." 260 U.S. at 414. *See Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring, joined by Holmes, J.) (citing *Pennsylvania Coal* as exemplifying "[p]rohibitory legislation . . . invalid, because unnecessary"). In *Hudson County Water Co.*, however, the Court emphatically denied that the State needed to demonstrate the necessity for a regulation aimed at conserving natural resources.

> We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

209 U.S. at 356-57. In this case, similarly, petitioner does not dispute that Rhode Island's program of conserving fish and water quality constitutes "a great public good." *Id.* at 357.

III. Appellant's Purported Development Rights Were Not Part of His Title

A. In Rhode Island, a Littoral Owner Acquires No Right to Fill Out Submerged or Tide-Flowed Lands By Purchasing Upland Property

Appellant claims that the State of Rhode Island has taken his property rights in submerged and tidal lands by denying him permission to extend his (dry) upland by filling out the land beyond the normal high tide line. Long-standing rules of Rhode Island property law, as determined by its courts and as illustrated by its statute law, flatly contradict appellant's claim. These rules go back in time much earlier than 1978, when petitioner acquired his interest in the subject property. Reply to Opposition to Petition for Writ of Certiorari, at 2.

The State, because it succeeded to the Crown's title in 1776, acquired all land up to the normal high tide line at that time. *See Payne & Butler, supra*, 77 Atl. at 153. A private plat or deed defining submerged or tidal lands as part of an upland parcel gives the purchaser no additional rights as against the State. *See Brown v. Goddard*, 13 R.I. 76, 81 (1880).

Salt ponds such as Westerly's are public waters. *See* R.I. Gen. Laws (1923), ch. 230, sec. 8 (state commissioners authorized to lease "any piece of land . . . , below mean low-water mark" in "Brightman's or Babcock's pond" in Westerly for cultivating shell-fish); R.I. Gen. Laws (1909), ch. 202, sec. 13 (directing commissioners not to lease any ponds in certain towns for use as private oyster fisheries); R.I. Gen. Laws (1938), ch. 634, sec. 1 ("waters" include

"all tide waters within the state" and "all inland waters of any . . . *pond"*) (emphasis added); R.I. Pub. Laws (1942), ch. 1148 (state agency directed to "open and keep open" breachways from salt ponds to the ocean "whenever necessary or desirable to *conserve the marine life in any salt pond"*) (emphasis added).

On many occasions Rhode Island has indeed given permission to shore landowners to fill out "flats" from dry upland. And appellant is not the first upland owner to perceive a "taking" in a decision by the State not to *give* that permission. As long ago as 1902, parties who asserted a right to "fill out . . . into tide water" simply by virtue of owning littoral upland were reminded by the Rhode Island Supreme Court that although such filling out had in the past been "very freely permitted," receiving permission in a particular case must still depend upon the "interests of the state." *Dawson v. Broome*, 24 R.I. 359, 363, 366, 368 (1902). The State's permission to fill out from dry upland is essentially a matter of releasing public rights rather than regulating pre-existing rights of that person.

The State has held its right of controlling lands below high tide (separate from its title to such lands) since 1776, when it succeeded to the powers of Parliament on this point. *See Payne & Butler, supra*, 77 Atl. at 153. The State has long delegated to particular agencies responsibility for deciding whether to grant permission to fill out tide-flowed lands. This can be seen using the code of 1938. While its language was different from today's, the obligation to obtain prior state approval before filling land like appellant's was just as clear then as it is now. The "division of harbors and rivers" had "control and supervision of all the harbors and tide-waters of the state." R.I. Gen. Laws (1938), ch. 112, sec. 7; *"tide-waters"* included *"flats"* such as appellant's. *See id.*, sec. 11 (emphasis added). The

division was to "regulate the depositing of *mud, dirt, and other substances* in the public *tide-waters* of the state, and . . . *prescribe the places* where the same may be deposited." R.I. Gen. Laws (1938), ch. 112, sec. 10 (emphasis added). Thus the division had power to authorize or prohibit such deposits in certain locations; its authority was not merely ministerial. Perhaps most significantly for present purposes, *"preservation"* was identified as part of promoting "the interests of the state therein." *Id.*, sec. 7 (emphasis added).

Specific procedures were required before anyone could "build into . . . public tide-waters, by authority of said division . . . , or *fill any flats.*" R.I. Gen. Laws (1938), ch. 112, sec. 11 (emphasis added). Work could not begin until after the developer gave "written notice" to the division, and after the division chief issued written approval of "plans of any proposed wharf or other structure and of *the flats to be filled.*" *Id.* (emphasis added). Here again, the regulation was not merely ministerial. The division chief could "alter the said plans at his discretion." *Id.*

Even when the State has given a landowner explicit permission to fill out tide-flowed lands, the State still has the power to reconsider and withdraw that permission until the filling has actually occurred or the landowner has at least relied detrimentally on the permission received. *See Gerhard v. Bridge Commissioners*, 15 R.I. 334, 335 (1886) ("even the establishment of a harbor line does not transfer the fee to the riparian owner, but only operates as a license to him to fill out"); *Allen v. Allen*, 19 R.I. 115, 116 (1895) ("Until actual filling out, the public rights exist as before"); *Greater Providence Chamber of Commerce v. Rhode Island*, 657 Atl. 2d 1038, 1044 (R.I. 1995) ("The state can, however, at any time, place restrictions on the

filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission"). *Cf. Providence & Worcester Railroad Co. v. Pine*, 729 Atl. 2d 202, 205-06 (R.I. 1999) (distinguishing land claims turning on "Harbor Line Acts" of 1866, 1870).

This case law explains why appellant acquired no vested right to fill his tide-flowed land when his application to do so was granted by the Division of Harbors and Rivers in April 1971: he had taken no steps towards doing the actual filling before the Division withdrew permission in November 1971, based on reconsideration of the circumstances. *See* Decision of Rhode Island Superior Court (Oct. 24, 1977), Pet. App. at B-2,3.

The State's title to submerged lands and tide-flowed lands below the high tide line has also been manifested by its leasing to private persons the public's right to occupy and use portions of such lands for private oyster fisheries. This practice began in the 1820s. *See generally Payne & Butler, supra*, 77 Atl. at 156-58 (discussing Rhode Island statutes of 1822, 1827); R.I. Gen. Stats. (1872), ch. 133, sec. 2 (authorizes commissioners to lease "any piece of land within the state, covered by tide water at low tide, and not within any harbor line," for private oyster fishery).

The State can also occupy and use lands below the high tide line itself. This is shown by a statute that has authorized commissioners of shell fisheries, in planting and cultivating shell-fish, to "occupy . . . to the exclusion of all persons, . . . any portion of . . . land within the state *covered by tide-water, at either high or low tide*, not within any harbor line," unless such land was already being used to raise shellfish. R.I. Pub. Laws (1917), ch. 1602, sec. 1 (emphasis added). This provision has remained in effect for over eighty years. *See* R.I. Gen. Laws (1938), ch. 237,

sec. 1; R.I. Pub. Laws (1956), ch. 3814; R.I. Gen. Laws (1956), sec. 20-3-4 (1998 & 2000 Supp.).

B. The Power to Regulate Private Land Use to Protect Groundwater From Degradation is a Background Principle of Rhode Island Property Law

An early regulatory takings opinion by Justice Holmes states that "the State as quasi-sovereign and representative of the public has a standing in court to protect . . . the water . . . within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." *Hudson County Water Co., supra*, 209 U.S. at 355. Rhode Island's objective of protecting the quality of its drinking water has long included private property within its ambit. *See* R.I. Gen. Laws (1938), ch. 635, sec. 1 ("No person shall . . . suffer to be thrown or discharged, into any well [or] pond . . . used as a source of water supply for drinking purposes by any . . . town . . . , or into any known tributary or feeder of any such [well, pond, etc.], any . . . thing . . . impairing or tending to corrupt the purity of the waters of any such . . . known tributary or feeder"); P.L. (1925), ch. 746 (directing town of Westerly to "facilitate the adequate provision of . . . water"). Given modern knowledge of the impact on groundwater caused by filling wetlands, those statutes would authorize protecting groundwater from degradation such as the "increased harmful nitrate levels" threatened by petitioner's plans, because "groundwater is the sole source of drinking water." Decision of Rhode Island Superior Court (Oct. 24, 1977), Pet. App. at B-10 (findings not disputed on appeal).

Petitioner is essentially asking this Court to make Rhode Island wait until the point when *any* additional nitrates will contaminate currently utilized sources, before implementing a groundwater conservation policy in connection with applications to fill out into wetlands. But as Justice Holmes stated for the Court long ago, the "public interest" in water "is omnipresent . . . , and grows

more pressing as population grows." *Hudson County Water Co., supra,* 209 U.S. at 356.

Justice Holmes also addressed the question of whether the regulatory takings doctrine requires a State trying to conserve its useable water to prove that its conservation efforts are *essential* to prevent harm. "[T]he constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . [The State] finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.* at 356-57.

CONCLUSION

For the reasons set forth above, the decision of the Rhode Island Supreme Court should be affirmed.

Respectfully submitted,

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